United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

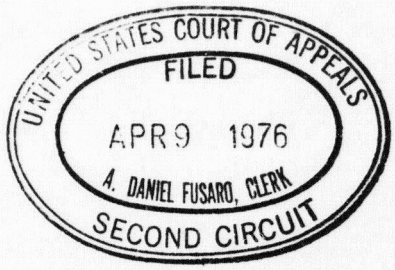
76-7022

ORIGINAL

To be submitted by
LEONARD KOERNER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



LUCIO P. SALVUCCI,

Plaintiff-Appellant,

v.

THE NEW YORK STATE RACING ASSN., INC., NEW YORK CITY OFF-TRACK BETTING CORP., ROOSEVELT RACEWAY, INC.; and JOSEPH A. GIMMA, AS HE IS CHAIRMAN OF THE NEW YORK STATE RACING COMMISSION,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE NEW YORK CITY OFF-TRACK BETTING CORPORATION

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LUCIO P. SALVUCCI,

Plaintiff-Appellant,

-against-

THE NEW YORK RACING ASSN., INC., NEW YORK CITY OFF-TRACK BETTING CORP.; ROOSEVELT RACEWAY, INC.; CHAIRMAN OF THE HEW YORK STATE RACING COMMISSION,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE NEW YORK CITY OFF-TRACK BETTING CORPORATION

Statement

In this action for copyright infringement, the plaintiff appeals from a judgment of the District Court for the Eastern District of New York (MISHLER, Ch. J.), entered December 2, 1975, in favor of all of the defendants and dismissing the complaint.

Question Presented

Did the District Court err in dismissing plaintiff's complaint pursuant to a motion for summary judgment, on the ground that plaintiff's ideas, which he had registered in the Office of the Register of Copyright, is not copyrightable material?

Facts

Complaint:

This action was commenced pursuant to the United States Copyright Laws, §17 U.S.C. 101, et seq. (3).* The complaint alleges four counts of copyright infringement; each separately directed against one of the defendants (4-7). Prior to March 30, 1962, the plaintiff "put into words a creative expression of exotic wagering on horses or dogs entitled Tri-3 and Tri-3 double" (1).

TRI-3 is a "3 finish position play or wager on horses or dogs" where the object is to select correctly all finish positions, starting with the first, chosen finish position of the bettor's TRI-3 ticket. If no one selects all three finish positions correctly, then the person getting the most consecutive correct finish positions starting with their first chosen finish position of their TRI-3 ticket is the winner (15).

TRI-3 Double "is a finish position play or wager consisting of positions 1, 2 and 3 in 2 races on horses or dogs" (12). The object is the same as TRI-3 except that the bettor must select correctly in both races (12). Winning tickets with the correct first three chosen positions for the first race must be exchanged by the bettor for selections in second race (12).

*Unless otherwise indicated, numbers in parentheses refer to pages in the Appellant's Appendix.

Between March 30 and April 2, the plaintiff registered Tri-3 Double and Tri-3 as copyrighted works in the Office of the Register of Copyrights (4, 10-12, 13-15).

After registering Tri-3 and Tri-3 Double, the plaintiff presented his idea to each of the defendants (2-6). Thereafter, each of the defendants "infringed said copyright by using a material appropriation of plaintiff's sequential order of finish entitled Big Triple and Triple" (4, 16). The complaint also alleged that the defendants had engaged in unfair trade practices and unfair competition (id.). The complaint sought injunctive relief and damages (6-7).

Motions to dismiss and summary judgment

On August 22, 1975, the New York City Off-Track Betting Corporation filed an answer (17-19). On October 10, Roosevelt Raceway, Inc., joined issue (20-26).

On November 7, Roosevelt Raceway, Inc., moved to dismiss the complaint and for summary judgment. In support of the motion, George Levy, President of Roosevelt, submitted an affidavit. Roosevelt offers three types of wagers: regular win, place and show selections; the "EXACTA", in which the bettor wins by selecting the horses in their exact order of first and second place positions and the "Triple" or Big Triple" by which the bettor wins by selecting the first, second and third horses in their exaxt order of finish (29-30, 33). The "EXACTA" was begun at Roosevelt

on July 15, 1965 and the "Triple" or "Big Triple" was started on March 3, 1971 (30).

Mr. Levy stated that the "Triple" or "Big Triple" was an extension of the "EXACTA" (30). Mr. Levy stated that Roosevelt Raceway has never offered forms of wagering known as "TRI-3" and "TRI-3 Double" (30-31).

On November 7, The New York State Racing Association, moved for summary judgment (29). In support of the motion, Patrick W. O'Brien, Vice President of Operations of the New York State Racing Association (NYRA), submitted an affidavit. NYRA, incorporated pursuant to Section 7902 of Title 21 of the Unconsolidated Laws of the State of New York, operates thoroughbred racing at Aqueduct, Belmont Park and Saratoga (52). The NYRA is supervised by the New York State Racing and Wagering Board (Board) (53). The Board regulates the use and conduct of parimutuel wagering in New York (53). The Board issues licenses to racing associations, corporations and publicly created off-track betting corporations (53). Only the forms of wagering approved by the Board can be used by its licensees (53). The Board has approved eight types of wagers, which include the "DAILY DOUBLE", the "EXACTA" and the TRIPLE (also called the Trifecta) (53-54). The types of wagers are set forth in the New York Code of Rules and Regulations, volume 9(D), Subtitle T, Part 4011 and Part 4122 (58-74). The TRIPLE was authorized for thoroughbred racing on August 28, 1973, and for harness tracks on March 1, 1971 (54).

Mr. O'Brien stated that versions of the TRIPLE have been used in France since 1954 (55, 78, 80). Mr. O'Brien also stated that NYRA has never described the TRIPLE in the language utilized by plaintiff to describe his "TRI_3" or in any similar language (56).

On November 7, 1975, Joseph Gimma, Chairman of the New York State Racing Commission, also moved to dismiss or for summary judgment.

Opinion Below

In dismissing the complaint, the District Court stated (138-139):

"Pari-mutuel betting is controlled by statute in New York State N.Y. Unconsolidated Laws, §§7952, 7954 and 8008. Methods of betting at authorized establishments are sanctioned by the New York State Racing and Control Board. In addition to conventional betting at thoroughbred and harness race tracks, the Board has approved the Daily Double, Quinella, Exacta, Trifecta (sometimes called the Triple), and Superfecta.

The method of betting is not copyrightable. Novel and useful ideas may attain patent protection, but not copyright protection. In Baker v. Selden, 101 U.S. 99 (1880), plaintiff obtained a copyright on a book explaining a system of bookkeeping. The court dismissed the claimed copyright infringement noting:

> There is no doubt that a work on the subject of bookkeeping though only explanatory of well known systems, may

> be the subject of a copyright; but, then, it is claimed only as a book. . . . The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. . . .
>
> . . . The copyright of a book on book-keeping cannot secure the exclusive right to make, sell and use account books prepared upon a plan set forth in such book. . . . 101 U.S. at 101-02, 104.

It is the manner of expressing and not the idea itself which is copyrightable. L. Batlin & Son, Inc. v. Jeffrey Snyder, d/b/a/ J.S.N.Y. and Etna Products Co., Inc., No. 75-7308 (2d Cir. October 24, 1975); Roth Greeting Cards v. United Car Co., 429 F. 2d 1106 (9th Cir. 1970); Welles v. Columbia Broadcasting System, Inc., 308 F. 2d 810 (9th Cir. 1962). The instant copyrights attempt to protect the method of betting and are invalid. Alternatively, should the complaint be interpreted as an infringement of the expression of the betting method, rather than the method itself, the court finds no genuine issue of fact exists since plaintiff's method of expression was never employed by defendants.

The limited copyright of the expression of the methods of betting was not infringed."

ARGUMENT

THE COMPLAINT WAS PROPERLY DISMISSED. THE PLAINTIFF'S SUGGESTION OF A METHOD OF BETTING THE TRI-3 AND THE TRI-3 DOUBLE IS AT MOST AN IDEA AND IS NOT COPYRIGHTABLE.

(1)

At the outset it should be noted that the District Court granted summary judgment in favor of all the defendants, although only the New York State Racing Association, Roosevelt Raceway and the New York State Racing Commission moved to dismiss or for summary judgment. The New York City Off-Track Betting Corporation submitted an answer asserting, among other things, that the plaintiff failed to state a cause of action (18). The appellant has properly not raised any objection on this appeal to the granting of summary judgment in favor of the non-moving party, the New York City Off-Track Betting Corporation. If the plaintiff has failed to state a cause of action or show that there is a genuine issue of fact requiring a trial, this Court, on an appeal or a District Court, on its own motion, can grant a motion to dismiss or summary judgment. See Lowenschuss v. Kove, 520 F. 2d 255, 261 (2d Cir., 1975); Proctor & Gamble Ind. U. v. Proctor & Gamble Mfg. Co., 312 F. 2d 181, 190 (2d Cir., 1962), cert. den. 374 U.S. 830 (1962); Baird v. Lynch, 390 F. Supp. 740, 746 (W.D. Wisc., 1974); White v. Fleming, 374 F. Supp. 267, 270 (E.D. Wisc., 1974), affd. 522 F. 2d 730 (7th Cir., 1975).

The District Court properly dismissed the plain-

tiff's complaint which alleged four counts of copyright infringement, each separately, directly against the four defendants. The plaintiff alleged that he had registered with the United States Copyright Office two methods of betting called TRI-3 and TRI-3 Double and that, after registration, the defendants used these ideas and infringed plaintiff's copyrights.

Copyright registration confers no right at all to the conception reflected in the registered subject matter. A copyright gives no exclusive right to the act or idea disclosed; protection is given only to the expression of the idea not the idea itself. Mazer v. Stein, 347 U.S. 201, 217 (1954); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F. 2d 738, 740 (9th Cir., 1971). See also, L. Batlin & Son, Inc. v. Snyder, _____ F. 2d _____ (2d Cir., 1975), slip. opin. pp. 6355, 6363-6364; Roth Greeting Cards v. United Card Comp.,429 F. 2d 1106, 1109 (9th Cir., 1972); Nichols v. Universal Pictures Corp., 45 F. 2d 119, 121 (2d Cir., 1930), cert. den. 282 U.S. 902 (1930).

In Mazer v. Stein, supra, 347 U.S. 201 (1953), the Court, after reviewing the history of the copyright statutes and the scope of protection the statutes were intended to confer, stated (p.217):

> "Unlike a patent, a copyright gives no exclusive right to the act disclosed; protection is given only to the expression of an idea - not the idea itself. Thus in Baker v. Selden,

> 101 U.S. 99, the Court held that a copyrighted book on a peculiar system of bookkeeping was not infringed by a similar book using a similar plan which achieved similar results where the alleged infringer made a different arrangement of the columns and used different headings. The distinction is illustrated in Fred Fisher, Inc. v. Dillingham, 298 F. 145, 151, when the court speaks of two men, each a perfectionist, independently making maps of the same territory. Though the maps are identical each may obtain the exclusive right to make copies of his own particular map and yet neither will infringe the others copyright."

Mazer and Baker v. Seldon, cited in the Mazer decision, establish the distinction between writings describing plans, methods or systems, which writings are subject to copyright protection, and the plans, methods or systems themselves, which are not subject to protection. This distinction was recognized in Briggs v. New Hampshire Trotting and Breeding Assn., Inc., 191 F. Supp. 234 (D.N. Hamp., 1960), which involved facts similar to the instant case. In Briggs, the plaintiff alleged that he was the author of a brochure which set forth a betting system and a method to process the betting system by using I.B.M. Machines. The plaintiff alleged that the defendant had introduced a similar system of betting in violation of his copyright and that the defendant had engaged in unfair competition. The District Court dismissed the complaint on the ground, among others "that the statutes and court decisions give no protection by copyright to sports, games or similar systems as distinguished from publications describing

them." 191 F. Supp. at pp. 236-237.

Prior to this proceeding, the plaintiff in the instant case commenced an action, alleging the same causes of action as alleged here, against the New Hampshire Jockey Club, Inc., and other defendants. On October 6, 1975, the District Court for New Hampshire, relying on Briggs v. New Hampshire Trotting and Breeding Association, Inc., 191 F. Supp. 234 (D.N. Hamp. 1960), dismissed the complaint. Salvucci v. New Hampshire Jockey Club, Inc., Dist. Ct., New Hampshire, Docket Nos. 75-223 and 75-224 affd. __ F. 2d __ (1st Cir., 1976), docket number 75-1434, opinion dated March 1, 1976 (45-46).

(2)

The District Court also properly found that, even if the plaintiff's method of betting could be protected as a form of expression under the copyright statute, the method was not used by the defendants. The plaintiff attached to his complaint a copy of two pages of a booklet of rules published by an off-track betting corporation. These two pages were alleged to be proof of each defendant's infringement. The pages describe the betting method called "The Triple." The description of "The Triple" is similar to that contained in the Rules of the New York State Racing and Wagering Board (61,72). These descriptions are not similar to plaintiff's description. Such descriptions do not satisfy plaintiff's burden of proof, which, in a case where the subject matter involved allows little variation

in the form of its expression, requires a showing of appropriation in exact form or plagiarism. See Continental Cas. Co. v. Beardsley, 253 F. 2d 702, 705 (2d Cir., 1958), cert. den. 358 U.S. 816 (1958); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F. 2d 738, 742 (9th Cir., 1971).

(3)

Plaintiff alleged in his complaint that the defendants, in using his "Big Triple" idea had "been engaging in unfair trade practices and unfair competition against plaintiff to plaintiff's irreparable damage" (4). To sustain a cause of action for unfair competition or unfair trade practices, the plaintiff must show that the use of his idea by the defendants had a destructive effect on the plaintiff's competitive position. See Hygienic Specialities Co. v. H.G. Salzman, Inc., 302 F. 2d 614, 620 (2d Cir., 1962); Blisscraft of Hollywood v. United Plastics Co., 294 F. 2d 694, 698 (2nd Cir., 1961); Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 835, 848 (E.D. N.Y., 1971).

Since the complaint does not allege that the plaintiff is in competition with the New York City Off-Track Betting Corporation or any of the other defendants, the plaintiff cannot establish that his competitive position was impaired by the defendants' actions and, therefore, he is not entitled to any relief based on that cause of action.

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED, WITH COSTS.

April 9, 1976.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel for the City of New York,
Attorney for Appellee New York City Off-Track Betting Corporation.

L. KEVIN SHERIDAN,
LEONARD KOERNER,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

BRUCE GARNER being duly sworn, says that on the 9 day of APR. 1976, he served the annexed BRIEF OF APPELLEE upon CAHILL, GORDON & REINDEL Esq., the attorney for the APP. (N.Y. RACING ASSOC.) herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 80 PINE ST. in the Borough of MAN'H., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 9 day of APR. 1976

CHARLES W. SEGAL
Notary Public, State of New York
No. 41-4604739
Qualified in Queens County
Commission Expires March 30, 1977

Bruce Garner

Charles W. Segal

Form 323-40M-703823(73) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

BRUCE GARNER being duly sworn, says that on the 9 day of APR. 1976, he served the annexed BRIEF OF APPELLEE upon LOUIS J. LEFKOWITZ Esq., the attorney for the (DEFT) APPELLEE - GIMMA herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 2 WTC in the Borough of MAN'H., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 9 day of APR. 1976

CHARLES W. SEGAL
Notary Public, State of New York
No. 41-4604739
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State of New York, County of New York, ss.:

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Sworn to before me, this 9 day of APR. 1976

CHARLES W. SEGAL
Notary Public, State of New York
No. 41-4604739
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Sworn to before me, this 9 day of APR. 1976

CHARLES W. SEGAL
Notary Public, State of New York
No. 41-4602739
Certified in Queens County
Commission Expires March 30, 1978

Charles W. Segal

Bruce Garner

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